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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1103

THE MENOMINEE TRIBE OF INDIANS, *et al.*,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 3

I. The Decision Below Allows Congress To Abrogate Vested Treaty Rights and Federal Trust Obligations Without Risk of Liability 3

II. The Decision Below Is Contrary to Established Case Law 4

III. The Decision Below Violates the Specific Language as Well as the Intent of the Indian Claims Commission Act 8

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases:

Choate v. Trapp, 224 U.S. 665 (1912) 5

Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) 5, 6

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 4, 5

Menominee Tribe v. United States, 391 U.S. 404 (1968) 5

Mitchell v. United States, 219 Ct. Cl. ___, 519 F.2d 1300, *cert. granted*, 99 S. Ct. 2880 (1979) 3, 5

Shoshone Tribe v. United States, 229 U.S. 476 (1937) 5

Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 390 F.2d 686 (1968) 6

United States v. Creek Nation, 295 U.S. 103 (1935) 6

Statutes:

28 U.S.C. § 1491 (1976) 3

28 U.S.C. § 1505 (1976) 3, 8

Page

50 Stat. 1049 (1946) 8

60 Stat. 1055-56 (1946) 8

Miscellaneous:

July 8, 1970, Message on American Indians, *reprinted in* M. Price, LAW AND THE AMERICAN INDIAN 597 (1973) 6

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This *amicus curiae* brief is filed by the National Congress of American Indians, Inc. with the consent of both parties.

INTEREST OF *AMICUS CURIAE*

The National Congress of American Indians, Inc. (NCAI), is a nonprofit association of 146 Indian tribes

located throughout the United States. It was founded in 1954 in Oklahoma and maintains its national headquarters in Washington, D.C. NCAI represents the interests of a wide variety of Indians and Indian tribes, including most of the major tribes in the country.

NCAI and its member tribes will be significantly and adversely impacted by the Court of Claims' decision in this case that it has no jurisdiction to hear nonconstitutional breach of trust claims resulting from abrogation of treaty rights and the federal trust obligations to Indian tribes where Congress rather than the Secretary of the Interior is responsible for the breach. NCAI member tribes have treaties and/or other agreements with the United States which guarantee the tribes certain fundamental rights, including, but not limited to, the right to exist as quasi-sovereign nations with powers of self-government under the guardianship and protection of the United States government. The trust responsibility assumed by the United States under these treaties constituted valuable consideration given in exchange for lands desired by the United States under the dominion and control of Indian tribes, and other concessions made by Indian tribes to agree to these treaties. The Court of Claims' decision in this case will allow Congress to abrogate treaty rights and trust responsibilities without incurring any liability whatsoever for the resulting harms. These Indian tribes have no other legal forum to prosecute their claims for such wrongdoings. As a result, the treaties and agreements made with NCAI members, and the fiduciary duties arising under them, lose their status as legally enforceable obligations and instead become gratuitous promises which Congress may alter at will.

The Court of Claims' decision in this case fundamentally alters the relationship between the United States and the Indian tribes, allows Congress to curtail or eliminate that responsibility at will, and severely limits the ability of tribes to hold the United States accountable for the mismanagement of Indian property and affairs. For these reasons, NCAI urges that the Supreme Court issue a writ of certiorari and reverse the decision of the Court of Claims.

ARGUMENT

I.

THE DECISION BELOW ALLOWS CONGRESS TO ABROGATE VESTED TREATY RIGHTS AND FEDERAL TRUST OBLIGATIONS WITHOUT RISK OF LIABILITY.

This case concerns the right of Indian tribes to recover for breaches by Congress of the fiduciary obligations assumed by the United States under sacred treaties with Indian tribes which, although resulting in monetary damages, do not violate constitutional provisions.[1] The Court of Claims concluded that under 28 U.S.C. §§ 1491 and 1505, its jurisdiction over Indian claims was limited to claims which alleged a violation of either a constitutional provision or an act of Congress.[2] Claims for

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[1]Although the specific issue before the Court of Claims was whether the United States was liable for breach of trust for terminating the Menominee Indian Tribe when such termination was directly opposed by the Tribe and contrary to their best interests, the Court of Claims, in holding that it had no jurisdiction to hear the Menominees' claim, broadened its ruling to include all congressional nonconstitutional breach of trust claims.

[2]The Court of Claims has laid down the requirements necessary to assert a claim for breach of statutory duty in *Mitchell v. United States*, 219 Ct. Cl. ___, 519 F.2d 1300, *cert. granted*, 99 S. Ct. 2880 (1979).

congressional violation of treaty and trust obligations which did not reach constitutional dimensions were determined to be outside the court's jurisdiction.

Although the specific issue before the Court of Claims was whether Congress breached its fiduciary duty to the Menominee Indians by terminating their federal status as Indians against their will and contrary to their best interests, the ramifications of that decision are much broader. By deciding that it had no jurisdiction to hear claims of nonconstitutional breaches of trust by Congress, the Court of Claims in fact made a substantive determination that Congress may abrogate or modify treaty rights and trust responsibilities without risk of liability for damages sustained by Indians as a result of such actions. Without risk of liability, the United States has no incentive to fulfill its fiduciary obligations, and should Congress decide for any reason that it is no longer desirable to live up to those obligations, it may simply eliminate them, without cost, irrespective of the severity of damages suffered by the tribes. This decision thus gives Congress a power, not heretofore recognized, to abrogate vested treaty rights. It also fundamentally alters the trust relationship between the United States and Indian tribes, for the United States will have no incentive to carry out its fiduciary duties, and the tribes will have difficulty holding the United States accountable for the mismanagement of their affairs.

II.

THE DECISION BELOW IS CONTRARY TO ESTABLISHED CASE LAW.

The Court of Claims correctly states that Congress has plenary power over Indians, and may legislate in matters concerning their affairs. *Lone Wolf v. Hitchcock,* 187

U.S. 553 (1903). NCAI admits that that power includes the authority to abrogate or modify treaties. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *Choate v. Trapp,* 224 U.S. 665 (1912); *Shoshone Tribe v. United States,* 229 U.S. 476 (1937); *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977). What the Court of Claims failed to realize, however, is a point long recognized by the Supreme Court—that the power to abrogate treaties does not encompass the authority to destroy the vested rights created by those treaties, *Choate v. Trapp,* 224 U.S. 665 (1912), and the United States is liable for damages when Congress passes an act eliminating such rights. *Menominee Tribe v. United States,* 391 U.S. 404, 413 (1968). The Court of Claims, by holding that it has no jurisdiction to hear a claim that Congress violated treaty obligations, is reversing this rule of law. If Indian tribes have no forum in which to assert a claim for damages suffered for the abrogation of their treaty rights by Congress, then they in effect have no rights at all,[3] and the prior pronouncements of the Supreme Court that Congress may not abrogate treaty rights without compensation are nullified.[4]

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[3]If the tribes have no remedy in the Court of Claims, then they have no forum in which their claims may be heard, for assuming, as the Court of Claims did, that an act of Congress is validly enacted and constitutionally permissible, the tribes have no basis for challenging the law in the federal court system. Moreover, as the Court of Claims correctly notes in *Mitchell v. United States,* 219 Ct. Cl. ___, 591 F.2d 1300, 1303 (1979), such prospective judicial relief as injunctions or mandamus, even when available, are meaningless for damages already incurred.

[4]NCAI recognizes that the Court of Claims realizes that to the extent the abrogation of treaty rights is a Fifth Amendment taking, the United States would be liable, irrespective of whether

[footnote continued]

The Court of Claims also failed to recognize that the Supreme Court has held that Congress' power to legislate Indian affairs is subject to the restraints inherent in the fiduciary obligations established by Indian treaties, *United States v. Creek Nation,* 295 U.S. 103, 109-110 (1935); *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977); *Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* 182 Ct. Cl. 543, 390 F.2d 686 (1968). Unlike the Court of Claims' rationale in this case, these limitations on congressional power are not simply *moral* constraints, but rather *legal* restrictions. As then President Nixon stated in his July 8, 1970 Message on American Indians rejecting the previous congressional policy of forced termination:

> *Termination implies that the Federal Government has taken on a trusteeship responsibility for Indian Communities as an act of generosity towards a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premises such as this.* The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life

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the actions were by Congress or the Executive Department. In many instances, however, the abrogation of treaty rights may encompass the elimination of rights which do not fit within the strictures of formal eminent domain law, and it is these instances which concern NCAI.

> on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. *But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.* [Emphasis added.]

July 8, 1970, Message on American Indians, *reprinted in* M. Price, LAW AND THE AMERICAN INDIAN 597 (1973).

The Court of Claims, by allowing Congress to abrogate treaty rights without incurring financial liability, is adopting the position specifically rejected by President Nixon. By denying Indian tribes a forum for redress of grievances caused by the passage of a law which, as enacted, constitutes a breach of fiduciary duty, the Court of Claims emasculates the Supreme Court's requirement that legislation enacted pursuant to Congress' plenary power over Indian affairs be consistent with its fiduciary obligations. It also fundamentally alters the trust relationship between the United States and Indian tribes, for the United States will have no incentive to carry out its fiduciary duties, and the tribes will have difficulty holding the United States accountable for mismanagement of their affairs. The inevitable result will be the destruction of the legal trust relationship between the United States and Indian tribes without legal recourse.

III.

THE DECISION BELOW VIOLATES THE SPECIFIC LANGUAGE AS WELL AS THE INTENT OF THE INDIAN CLAIMS COMMISSION ACT.

The Court of Claims' decision in this case also violates the provisions of the Indian Claims Commission Act. 50 Stat. 1049 (1946). Although that Act expressly grants the Court of Claims jurisdiction to hear claims arising under treaties, 28 U.S.C. § 1505, the court concluded that it in fact did not have the power to hear claims of congressional abrogation of treaty rights. Moreover, the Act also provides that it was not intended to alter the trust relationship between the United States and the tribes. 60 Stat. 1055-56 (1946). Although ostensibly decided on jurisdictional grounds, the Court of Claims' decision in fact will significantly impact the substantive rights of Indians and profoundly alter the trust relationship, in violation of the terms and purposes of the Act. If the Court of Claims' decision is allowed to stand, Indian tribes will once again be forced to petition Congress to seek special jurisdictional acts for redress of their grievances. This clearly was not the intent of Congress in passing the Indian Claims Commission Act.

CONCLUSION

If congressional actions concerning Indian tribes are immune from judicial review, Congress will have no incentive to preserve the historic treaty obligations and trust responsibilities which exist between Indians and the United States. Although the present case involves a termination statute, the issue involved is substantially broader, and will come into play any time Congress passes an act which, although serving a valid, constitutional purpose, results in otherwise compensatory

damages suffered by an Indian tribe as a result of the abrogation of a treaty or trust obligation. As the termination policy in the 1950's clearly demonstrated, the threat of destruction of the special trust relationship creates significant apprehension among Indian tribes, causing them to avoid social, economic and political autonomy and seek increased federal dependency. If the Court of Claims' decision in this case is allowed to stand, the same result will occur again. The decision violates the provisions and purpose of the Indian Claims Commission Act, is contrary to existing case law, and will have a broad, adverse impact on Indian tribes throughout the country. NCAI therefore urges this Court to issue a writ of certiorari to review and reverse the Court of Claims' decision.

Respectfully submitted,

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